

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

NEIL BIDON, R.N.

and

DAVID CAPUANO, R.N.

and

EILEEN DONAGHEY, R.N.

and

Case No.: 20-1197 C

JUDY GORDON, R.N.

and

KATHLEEN KUS, R.N.

and

MARGARITA ORTIZ, R.N.

and

ELAINE RINSLAND, R.N.

and

STEPHANIE ROACH, R.N.,

and

**LORRAINE SUCHY, R.N., on behalf of themselves
and all others similarly situated,**

Plaintiffs,

v.

THE UNITED STATES OF AMERICA

Defendant.

COMPLAINT

The Plaintiffs, Neil Bidon, R.N., David Capuano, R.N., Eileen Donaghey, R.N., Judy Gordon, R.N., Kathleen Kus, R.N., Margarita Ortiz, R.N., Elaine Rinsland, R.N., Stephanie Roach, R.N., and Lorraine Suchy, R.N., on their own behalf and on the behalf of all others similarly situated, by and through their undersigned counsel, hereby file this Complaint against Defendant, the United States of America, to redress actions and omissions taken by Defendant in violation of 38 U.S.C. § 7453 and other applicable laws, rules and regulations. Plaintiffs and all others similarly situated, seek a declaratory judgment, backpay and other relief. Plaintiffs and all others similarly situated also seek interest on the above amounts pursuant to the provisions of 5 U.S.C. § 5596(b), along with attorney's fees and costs.

INTRODUCTION

1. This is a class action brought by Plaintiffs, on behalf of themselves and all other similarly situated current and former Registered Nurses employed by the United States Department of Veterans Affairs ("VA") at the Veterans Affairs Connecticut Healthcare System ("VACHS"), located throughout the state of Connecticut, who have not received overtime pay or compensatory time off to which they are entitled under 38 U.S.C § 7453 and under VA regulations and policies, for all hours of work that they performed on a recurring and involuntary basis and in excess of fifteen (15) minutes, in excess of forty (40) hours in an administrative workweek, and/or in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement. Specifically, this excess work was performed during time which was designated as meal time or break time and for which Plaintiffs and others similarly situated were not paid.

JURISDICTION AND VENUE

2. Jurisdiction over this action is conferred by 28 U.S.C. § 1491(a)(1) (Tucker Act).
3. Venue is proper in this Court pursuant to 28 U.S.C. § 1491(a)(1).

FACTUAL ALLEGATIONS

4. Plaintiff Neil Bidon, RN., is an adult citizen of the United States, residing in Orange, Connecticut. Nurse Bidon has been employed by the VA in the VACHS during the entire relevant damages period. He is currently a Nurse II.

5. Plaintiff David Capuano, RN., is an adult citizen of the United States, residing in Cheshire, Connecticut. Nurse Capuano has been employed by the VA in the VACHS during the entire relevant damages period. He is currently a Nurse II.

6. Plaintiff Eileen Donaghey, R.N., is an adult citizen of the United States, residing in Newington, Connecticut. Nurse Donaghey has been employed by the VA in the VACHS during the entire relevant damages period. She is currently a Nurse II.

7. Plaintiff Judy Gordon, RN., is an adult citizen of the United States, residing in Hilford, Connecticut. Nurse Gordon has been employed by the VA in the VACHS for approximately five years. She is currently a Nurse II.

8. Plaintiff Kathleen Kus, RN., is an adult citizen of the United States, residing in Old Lyme, Connecticut. Nurse Kus has been employed by the VA in the VACHS during the entire relevant damages period. She is currently a Nurse II.

9. Plaintiff Margarita Ortiz, R.N., is an adult citizen of the United States, residing in Hamden, Connecticut. Nurse Ortiz has been employed by the VA in the VACHS during the entire relevant damages period. She currently a Nurse II.

10. Plaintiff Elaine Rinsland, RN., is an adult citizen of the United States, residing in

New Haven, Connecticut. Nurse Rinsland has been employed by the VA in the VACHS during the entire relevant damages period. She is currently a Nurse II.

11. Plaintiff Stephanie Roach, R.N., is an adult citizen of the United States, residing in East Haven, Connecticut. Nurse Roach has been employed by the VA in the VACHS during the entire relevant damages period. She is currently a Nurse II.

12. Plaintiff Lorraine Suchy, R.N., is an adult citizen of the United States, residing in Southbury, Connecticut. Nurse Suchy has been employed by the VA in the VACHS for approximately 15 months. She currently a Nurse I.

13. With respect to the allegations made in this Complaint, Defendant, the United States of America, has acted principally through the United States Department of Veterans Affairs (“VA”). At all relevant times, the agents, officers, and representatives of the United States who took the actions at issue, were duly authorized by the United States to take those actions and thus, Defendant, the United States of America, is ultimately responsible for the actions described in this Complaint.

14. At all relevant times, Plaintiffs and others similarly situated were employed as Registered Nurses within the meaning of 38 U.S.C. §§ 7401(1), 7404, 7421, 7422, 7451, 7452, and 7453.

15. At all relevant times, up until and including the present, Plaintiffs and others similarly situated have been paid on an hourly basis.

16. With respect to “Determining Whether Activities of Health Care Professionals Constitute VA Work,” VA policy (VA Handbook 5011, Part II, Chapter 3) states that, “The statutory missions of VHA include patient care, research and education, and supporting these broad missions entail a variety of different work activities. The primary focus is patient care ...”

17. VA policy (VA Handbook 5011, Part II, Chapter 3) also states that, “[On-site (VA grounds)] Clinical duties involve providing and/or supervising patient services at VA, clinical teaching at VA related to the care of VA patients, providing patient care at an outpatient clinic, or participating in interdisciplinary patient care conferences at VA. For example, patient evaluation, invasive procedures, consultation, attending rounds, journal club, follow-up calls, clinical documentation, care coordination, or care planning conferences.”

18. VA policy (VA Handbook 5011, Part II, Chapter 2) states: “[N]ormally, during each 8-hour tour, employees will be allowed a specific period of time off to eat a meal. A meal period during which employees are regularly and totally excused from their official duties may not be considered as an official duty period for which compensation is payable. When a meal period is set aside, the length of the tour or workday will be extended by the length of the non-work period.”

19. VA policy (VA Handbook 5011, Part II, Chapter 3) states: “Basic Workweek. Unless otherwise indicated, the ‘basic workweek’ for full-time employees shall be 40 hours in length. The normal tour of duty within the 40-hour basic workweek shall consist of five 8-hour days, exclusive of the meal period.”

20. VA policy (VA Handbook 5011, Part II, Chapter 3) states: “[A] compressed workweek may only be established if all daily tours of duty within the compressed workweek are in whole hour increments, excluding the meal period (e.g., eight 10-hour tours, eight 9-hour and one 8-hour tour, or six 12-hour and two 4-hour tours of duty each biweekly period). If, however, the meal period is considered hours of work under this chapter, any daily tour of duty on such a day must be in whole hour increments, including the meal period.”

21. During all relevant times, up until and including the present, Plaintiffs and others

similarly situated were scheduled to work eight (8), ten (10) and/or twelve (12) hour shifts, exclusive of meal periods.

22. During all relevant times, up until and including the present, Plaintiffs and others similarly situated routinely worked for all or a portion of their unpaid meal period in excess of fifteen (15) minutes duration in a calendar day, on a recurring and involuntary basis, and for tours of duty in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement performing patient care clinical duties.

23. At all times relevant to this action and continuing to the present, Defendant, including nurse supervisors and/or other VA personnel with the authority to order or approve overtime work and pay, had knowledge that Plaintiffs and others similarly situated on a recurring and involuntary basis worked additional hours in excess of fifteen minutes in a calendar day, in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirements providing clinical care, and expected, required, and induced Plaintiffs and others similarly situated to work during their unpaid meal period to ensure that patient care was not compromised.

24. Upon reporting to work, nurses are assigned to provide care to specific patient(s). Upon receipt of such assignment, the nurse assumes responsibility for their assigned patient(s) for the entire duration of their shift – to include, during their unpaid meal period.

25. Once a patient is assigned, the nurse is fully responsible for that patient until such time that they can provide a hand-off report to another nurse. There is no mechanism in place that allows a nurse to be fully relieved of their patient care duties in the middle of his or her shift or during the unpaid meal period.

26. Even on the occasions when a nurse is able to take a brief break, they are frequently interrupted by doctors and other staff members with questions or concerns about their assigned patients. These interruptions routinely last more than 15 minutes.

27. On several units there is only one single nurse assigned during each shift. In those units, nurses regularly perform work during the unpaid meal period.

28. Nurses who do not work during their unpaid meal period or for tours of duty in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement to provide such clinical care, are led to believe that they may jeopardize patient health and safety and cause adverse patient outcomes and are subject to intensified scrutiny, management intervention, and potential disciplinary action for poor time management and/or insubordination.

29. Nurses who do not work during their unpaid meal period or for tours of duty in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement to provide such clinical care, are led to believe that their actions may result in harm to patients, thereby subjecting the nurses and/or the VA to medical malpractice claims and/or claims from state licensing authorities.

30. During either nurse or management initiated interventions to address time management issues of the overwhelming and excessive workload which necessitated employees to work through their unpaid meal period, VA management has never offered to substantively reduce the workload in other areas of their nurse responsibilities to allow Plaintiffs and others similarly situated to have a workload that realistically reflects their actual work requirement and can be completed within a regularly scheduled shift.

31. At all times relevant to this action and continuing to the present, there have been

significant staffing shortages of many personnel, including registered nurses at the VACHS. Management has been aware of these staffing shortages.

32. These staffing shortages result in Plaintiffs, and others similarly situated, being required to perform additional duties outside of their position descriptions.

33. On some occasions, Plaintiffs and others similarly situated have requested and received overtime pay or compensatory time off for working through their unpaid meal period in excess of fifteen (15) minutes duration in a calendar day, and in excess of their regularly scheduled daily or weekly shift in order to provide clinical care.

34. On some occasions, requests for overtime pay or compensatory time off, made by Plaintiffs and others similarly situated for work performed during their unpaid meal period in excess of fifteen (15) minutes duration in a calendar day, and in excess of their regularly scheduled daily or weekly shift in order to provide clinical care, were denied.

35. At all times relevant to this action and continuing to the present, Defendant has willfully failed to compensate Plaintiffs and others similarly situated with overtime pay at one and one-half times each nurse's hourly rate of pay or compensatory time off for all hours worked on a recurring and involuntary basis, in excess of fifteen (15) minutes duration in a calendar day, and/or in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement, which were not otherwise approved as overtime and paid, or compensatory time off and granted.

36. Plaintiffs and others similarly situated have made numerous attempts to correct the VA's failure to pay the proper additional overtime pay.

37. Defendant's failure to compensate Plaintiffs and others similarly situated with overtime pay or compensatory time off for all additional hours worked on a recurring and

involuntary basis, in excess of fifteen (15) minutes duration in a calendar day, and/or in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement continues to the present.

38. As a result of the Defendant's conduct described in this Complaint, Plaintiffs and others similarly situated individuals have suffered and continue to suffer injuries including, but not limited to, economic loss by not receiving the pay or time off to which they are entitled.

39. The conduct described in this Complaint has been, and continues to be intentional.

CLASS ALLEGATIONS

40. Plaintiffs incorporate the allegations of Paragraphs 1 through 33 of the Complaint as if fully set forth herein.

41. Class Description: The Plaintiff Class consists of:

- a) all persons who are past or present registered nurses (I, II, or III) employed by the VA, VACHS; and
- b) who were or are employed within six (6) years preceding the filing of the original Complaint in this action; and
- c) who performed or are performing compensable patient care and clinical duties during their unpaid meal period on a recurring and involuntary basis worked additional hours, in excess of fifteen (15) minutes duration in a calendar day, and/or in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement; and
- d) who did not receive overtime pay at one and one-half times their hourly rate of pay, or compensatory time off in lieu of overtime pay for all additional hours worked.

42. This action is properly maintained as a class action under Rule 23(a) and 23(b) of the Rules of the United States Court of Federal Claims (“RCFC”).

43. The class is so numerous that joinder of all members as plaintiffs is impracticable.

44. Plaintiffs reasonably estimate that the pool of potential class members is in excess of several hundred present and former employees.

45. There are common questions of law and fact that affect the members of the class and predominate over any questions affecting only individual members. The primary legal and factual questions in this case include, but are not limited to:

a) Whether the Plaintiffs and others similarly situated were induced to perform work for the benefit of the VA during their unpaid meal periods satisfying the statutory requirement that overtime work be officially ordered or approved;

b) Whether the VA’s failure to pay Plaintiffs for all additional hours worked with overtime pay at one and one-half times each affected nurse’s hourly rate of pay, or to the extent requested and permissible with compensatory time off requested in writing, violates the additional overtime pay provisions of 38 U.S.C. § 7453 and/or VA overtime regulations and policies;

c) If the Plaintiffs prevail on the issues of liability, what are the amount of damages to which the Plaintiffs and other class members are entitled?

46. Plaintiffs’ claims are typical of the claims of the class, and Plaintiffs have no interests adverse to or in conflict with those of other class members.

47. Plaintiffs will fairly and adequately protect the interests of the class. They have retained competent counsel experienced in class action litigation and in litigation involving pay statutes.

COUNT I
VIOLATION OF NURSE ADDITIONAL PAY STATUTE 38 U.S.C. § 7453
BY DEPARTMENT OF VETERANS AFFAIRS

48. Plaintiffs incorporate the allegations of Paragraphs 1 through 41 of the Complaint as if fully set forth herein.

49. Per 38 U.S.C. § 7453(e)(1), “A nurse performing officially ordered or approved hours of service in excess of 40 hours in an administrative workweek, or in excess of eight consecutive hours, shall receive overtime pay for each hour of such additional service. The overtime rates shall be one and one-half times such nurse’s hourly rate of basic pay.”

50. Per 38 U.S.C. § 7453(e)(2), “For purposes of this subsection, overtime must be of at least 15 minutes duration in a day to be creditable for overtime pay.”

51. Per 38 U.S.C. § 7453(e)(3), “Compensatory time off in lieu of pay for service performed under the provisions of this subsection shall not be permitted, except as voluntarily requested in writing by the nurse in question.”

52. Per 38 U.S.C. § 7453(f), “For the purpose of computing the additional pay provided by subsection (b), (c), (d), and or (e), a nurse’s hourly rate of basic pay shall be derived by dividing such nurse’s annual rate of basic pay by 2080.”

53. Defendant’s knowledge of the additional hours worked by Plaintiffs and others similarly situated on a recurring and involuntary basis, in excess of fifteen (15) minutes duration in a calendar day, and in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement and Defendant’s expectation, requirement, and inducement to work those additional hours constitute Defendant’s order or approval for the additional hours worked.

54. At all times relevant to this action and continuing to the present, Defendant

willfully failed to pay Plaintiffs and others similarly situated for additional hours worked on a recurring and involuntary basis, in excess of fifteen (15) minutes duration in a calendar day, and in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement at an overtime rate of one and one-half times the hourly rate of pay or with compensatory time off.

55. The foregoing actions of Defendant constitute violations of the additional overtime pay provisions of 38 U.S.C. § 7453.

56. Plaintiffs and others similarly situated, who have been employed as registered nurses (I, II, or III) have been financially damaged by the VA's failure to properly pay additional overtime pay and are entitled to recover from the Defendant relief that includes, but is not limited to, any and all unpaid overtime back pay, and interest on such overtime back pay, for all additional hours worked on a recurring and involuntary basis, in excess of fifteen (15) minutes duration in a calendar day, and in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement; and, reasonable attorney's fees and costs of this action pursuant to 38 U.S.C. § 7453 and 5 U.S.C. § 5596.

COUNT II
VIOLATION OF OVERTIME REGULATIONS AND POLICIES BY
DEPARTMENT OF VETERANS AFFAIRS

57. Plaintiffs incorporate the allegations of Paragraphs 1 through 41 of the Complaint as if fully set forth herein.

58. Per 38 U.S.C. § 7421(a) and (b), the VA Secretary "shall prescribe by regulation the hours and conditions of employment and leaves of absence" of employee classifications that include registered nurses.

59. In VA Handbook 5011 and VA Directive 5011, the VA has promulgated policies pertaining to Hours of Duty and Leave for Title 38 employees.

60. Per VA policy (Handbook 5011, Part II, Chapter 3), “Unless otherwise indicated, the ‘basic workweek’ for full-time employees shall be 40 hours in length. The normal tour of duty within the 40-hour basic workweek shall consist of five 8-hour days, exclusive of the meal period.”

61. Per VA policy (Handbook 5011, Part II) the term “administrative workweek” is defined to be “[a] period of 7 consecutive calendar days, which coincide with the calendar week, Sunday through Saturday.”

62. Per VA policy (Handbook 5011, Part II, Chapter 3) employees are permitted to work “flexible” and “compressed work schedules” that do not conform to the “basic workweek” for Title 38 employees appointed under 38 U.S.C. § 7401(1), which includes registered nurses.

63. Per VA policy (Directive 5011/2, Transmittal Sheet), “In the establishment of work schedules, employees will have their assignments scheduled in advance over periods of not less than one administrative workweek and such schedules will be established in a manner that realistically reflects the actual work requirement.”

64. Per VA policy (Directive 5011/2, Transmittal Sheet), “Duty schedules for Title 38 healthcare employees shall be established as appropriate and necessary for performance of services in the care and treatment of patients and other essential activities within the administration for the Under Secretary for Health or designated officials.”

65. In VA Handbook 5007 and VA Directive 5007, the VA has promulgated policies pertaining to Pay Administration for Title 38 employees.

66. Per VA policy (Handbook 5011, Part II, Chapter 3), “Timekeeping documents

shall reflect actual hours worked by full-time, part-time, and intermittent employees. Failure to appropriately monitor compliance with the policies and procedures in this handbook, or failure to properly account for time and attendance may result in appropriate disciplinary and/or legal action.”

67. Per VA policy (Handbook 5007/12, Part V, Chapter 2), “Except as provided in paragraph 3a of this chapter, probational and permanent full-time nurses, PAs [physician assistants], and EFDAs are employed on the basis of a 40-hour basic workweek, unless on an alternate work schedule, as indicated in VA Handbook 5011, Hours of Duty and Leave. Computation of regular pay for employees on the 40-hour basic workweek shall be based on a basic hourly rate, derived by dividing the employee’s annual rate of basic pay by 2080 . . . Overtime must be at least 15 minutes duration in a calendar day to be creditable for overtime purposes . . . Overtime is payable for service performed in excess of 40 hours in an administrative workweek, or in excess of 8 hours in a day, whichever is greater, at a rate of one and one-half times the employee’s basic hourly pay. Note: For employees on compressed work schedules, overtime pay is payable for service performed in excess of the employee’s daily work requirement . . . An official authorized to approve overtime work may, at the written request of eligible employees, grant such employees compensatory time off from their scheduled tour of duty in lieu of overtime pay.”

68. Per VA policy (Directive 5007), “VA will administer pay programs in a fair and equitable manner, consistent with applicable title 5 and title 38 provisions, Office of Personnel Management (OPM) regulations, and applicable Comptroller General and OPM decisions.”

69. Defendant’s knowledge of the additional hours worked by Plaintiffs and others similarly situated on a recurring and involuntary basis, in excess of fifteen (15) minutes duration

in a calendar day, and in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement and Defendant's expectation, requirement, and inducement to work those additional hours constitute Defendant's order or approval for the additional hours worked.

70. At all times relevant to this action and continuing to the present, the Defendant willfully failed to pay Plaintiffs and others similarly situated for additional hours worked on a recurring and involuntary basis, in excess of fifteen (15) minutes duration in a calendar day, and/or in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement with overtime pay at a rate of one and one-half times each nurse's hourly rate of pay or compensatory time off.

71. The foregoing actions of the Defendant constitute violations of VA regulations and policies, enumerated in paragraphs 52 through 59, enacted and implemented pursuant to the VA's authority under 38 U.S.C. § 7421, as well as violations of the additional overtime pay provisions of 38 U.S.C. § 7453.

72. Plaintiffs and others similarly situated, who have been employed as registered nurses (I, II, or III) have been financially damaged by the VA's failure to properly pay additional overtime pay and are entitled to recover from the Defendant relief that includes, but is not limited to, any and all unpaid overtime back pay, and interest on such overtime back pay, for all additional hours worked on a recurring and involuntary basis, in excess of fifteen (15) minutes duration in a calendar day, and/or in excess of forty hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement; and, reasonable attorney's fees and costs of this action pursuant to 38 U.S.C. § 7453, 5 U.S.C. § 5596, and VA regulations and policies.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

1. Certify this case as a class action pursuant to RCFC 23(b); certify Plaintiffs as the class representatives; and approve the undersigned attorneys as attorneys for the class;
2. Declare that the Defendant's conduct alleged herein to be in violation of the Plaintiffs' rights under 38 U.S.C. § 7453, and under overtime pay regulations and policies of the VA;
3. Order Defendant to cease failing to comply with 38 U.S.C. § 7453 and regulations and policies of the VA by failing to properly pay Plaintiffs and the class members overtime pay or compensatory time off for additional hours worked on a recurring and involuntary basis, in excess of fifteen (15) minutes duration in a calendar day, in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, and/or in excess of their daily work requirement;
4. Enter judgment against Defendant for all back pay due to Plaintiffs and all others similarly situated for any and all unpaid overtime pay due under 38 U.S.C. § 7453, 5 U.S.C. § 5596, and overtime pay regulations and policies of the VA, which Defendant unlawfully withheld from Plaintiffs and all others similarly situated for those hours worked during an individual's unpaid meal period on a recurring and involuntary basis, in excess of fifteen (15) minutes duration in a calendar day, and/or in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement during the statutory period;
5. Award Plaintiffs and the class they represent an adjustment for any negative State and Federal Income Tax consequences they may incur, related to the payment of any award

herein;

6. Award Plaintiffs and the class they represent pre-judgment interest on any and all unpaid wages or other damages to which they may be entitled;
7. Award interest pursuant to 5 U.S.C. § 5596(b) on all above amounts;
8. Award reasonable attorney's fees and the costs and disbursements of this action to be paid by Defendant to Plaintiffs' counsel under 5 U.S.C. § 5596;
9. Grant such further and other relief as this Court deems just and proper.

Respectfully submitted,

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Of Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of September, 2020, a copy of the foregoing Complaint and Civil Cover Sheet were filed with the Clerk of Court via the CM/ECF filings system. Pursuant to the Rules of the United States Court of Federal Claims, the Clerk of Court will serve the Defendant, United States.

I further certify that a copy of this Complaint was served onto Liridona Sinani, Esq., Counsel of Record for Defendant in the related case of *Oztimurlenk, et. al., v. United States*; Case No. 19-01715.

/s/ JACOB Y. STATMAN

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